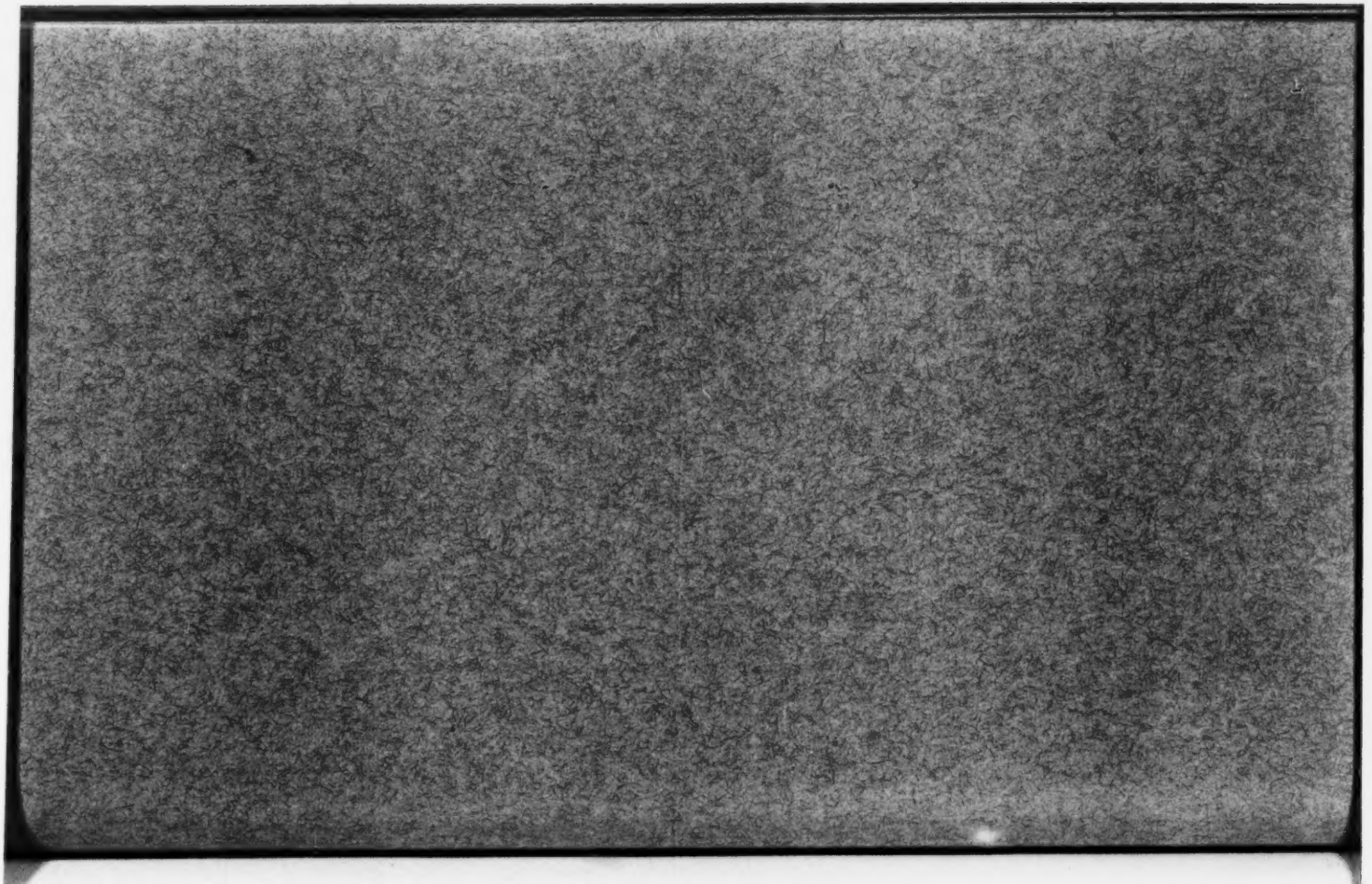
No. 476



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 476

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 123–129) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered August 19, 1943 (R. 131), and petitioner's petition for rehearing in that court was denied October 6, 1943 (R. 144). The petition for a writ of certiorari was filed November 5, 1943. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23 (herein sometimes termed "the Act"), making ap-

plicable Section 240 of the Judicial Code, as amended (28 U. S. C. sec. 347).

QUESTION PRESENTED

Whether maximum price regulations issued by the Administrator are invalid under the Emergency Price Control Act insofar as they forbid petitioner, on the closing of its Philadelphia gypsum mill, to sell gypsum products shipped from its plants located outside the Philadelphia area to purchasers within that area at prices higher than those maintained for this class of purchaser in March 1942.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended, c. 578, 56 Stat. 765, 767 (50 U. S. C. App., Supp. II, 901 *et seq.*), appear in the Appendix, *infra,* pp. 18–22. The price regulations involved in this proceeding appear at R. 74–88 and R. 106–117.

STATEMENT

Petitioner owns a manufacturing plant located in Philadelphia from which petitioner has sold gypsum products to purchasers in neighboring states.[1] Competitive manufacturers of gypsum

[1] The territory in which petitioner has normally sold the products of its Philadelphia plant is termed the "Philadelphia area" and includes all or parts of Pennsylvania, New Jersey, Delaware, Maryland, and the District of Columbia (R. 26).

products do not own manufacturing plants in the Philadelphia area, but deliver gypsum products to purchasers in that area from plants in New York and Virginia located near other manufacturing plants operated by petitioner (R. 49).

Sales of gypsum products from petitioner's Philadelphia mill have determined the level of prices in that area. Thus, in parts of the Philadelphia area, prices quoted f. o. b. Philadelphia have been maintained not only by petitioner on sales from its Philadelphia mill but also by its competitors shipping from their plants located outside the area. (R. 49.) Moreover, when petitioner received more orders from the Philadelphia area than could be supplied by the Philadelphia mill, or when the Philadelphia mill was closed by strikes or for other reasons, petitioner delivered gypsum products to its customers in this area from its more remote mills at the Philadelphia price plus freight as if from Philadelphia (R. 37–38). In addition, in and around metropolitan Philadelphia, areas of uniform delivered prices have been established and have been observed on all sales by both petitioner and its competitors (R. 54).

On April 28, 1942, the Administrator issued the General Maximum Price Regulation, which for the first time established maximum price control for numerous commodities, including gypsum products. This regulation provided that a seller's maximum price for commodities dealt in during March 1942 should be the "highest price charged

by the seller during such month" (R. 75n) and defined the phrase "highest price charged" as "a price charged during March 1942 to a purchaser of the same class" (R. 76n). The regulation further provided: " 'Purchaser of the same class' refers to the practice adopted by the seller in setting different prices for * * * purchasers located in different areas * * *" (R. 85). On July 29, 1942, the General Maximum Price Regulation was supplemented with respect to gypsum products and numerous other commodities by Maximum Price Regulation No. 188, without material change in the quoted provisions (R. 108, 113, 115).

In March 1942, petitioner's Philadelphia mill was in operation and the pricing practices of the industry with respect to sales of gypsum products in the Philadelphia area were those just outlined. In July 1942 petitioner found it necessary to close its Philadelphia mill because of requisitioning of the vessels which had brought gypsum rock from Nova Scotia to Philadelphia (R. 29). As a result petitioner, like its competitors, could supply customers in the Philadelphia area only from plants located in New York and Virginia.

On September 1, 1942, an official interpretation of the applicable maximum price regulations was issued, to the effect that these regulations prohibited sales of gypsum products in the Philadelphia area at prices higher than the price structure based upon Philadelphia which had been in effect

in March 1942.[2] Under this interpretation the General Maximum Price Regulation and Maximum Price Regulation No. 188 required petitioner to absorb the amounts by which freight costs on shipments from its mills located outside the Philadelphia area exceeded the freight costs from Philadelphia to the purchaser. Competitors of petitioner were required to continue the freight absorption which in the past they had voluntarily adopted to meet the competition of the Philadelphia mill (R. 71).

On October 23, 1942, petitioner filed with the Administrator a protest asserting that the General Maximum Price Regulation and Maximum Price Regulation No. 188, as so interpreted, were invalid under the Act (R. 21–46). The Price Administrator incorporated certain economic data into the record of the protest proceeding and provided petitioner with the opportunity of showing the extent, if any, to which petitioner or other members of the industry were subjected to hardship by reason of the maximum prices to which petitioner objected (R. 48). Petitioner did not supply such evidence in response to this order. The protest was denied by the Price Administrator (R. 63–73) and the petitioner thereupon filed a complaint with the United States Emergency

[2] The interpretation of September 1 revoked an earlier interpretation, found to be erroneous, which would have permitted all sellers to abandon the maximum prices based on Philadelphia.

Court of Appeals (R. 1–13). The court dismissed the complaint, holding that the application of the maximum price regulations issued by the Price Administrator to sales of gypsum products in the Philadelphia area fully complied with the requirements of the Act (R. 123–129).

ARGUMENT

In the proceeding before the Price Administrator, petitioner sought to challenge broadly the General Maximum Price Regulation and Maximum Price Regulation No. 188 on the ground that the prices of the commodities subject to these regulations had not "risen or threatened to rise" within the meaning of Section 2 (a) of the Act. The Price Administrator's opinion pointed out that such an objection to the initial validity of the regulations could not properly be raised, since petitioner's protests had not been filed within the sixty-day period following issuance of the regulations, as required by Section 203 (a) of the Act (R. 73).[3] As the court below observed, petitioner then abandoned this contention (R. 125). The issues properly involved in this proceeding are consequently limited in scope, and turn on the effect of the closing of petitioner's Philadelphia

[3] The Price Administrator has conceded throughout this proceeding that the interpretation of September 1, 1942, with respect to the effect of the closing of the Philadelphia mill, gave rise to new grounds of protest against the validity of the maximum price regulations as so construed. Cf. *Galban Lobo Co.* v. *Henderson*, 132 F. (2d) 150 (Em. Ct. App. 1942).

mill upon maximum prices for gypsum products sold in that area. The issues must be viewed, moreover, in the light of the price practices of petitioner and the industry in that area, and petitioner's failure to attempt a showing of hardship resulting from the regulations.

1. The first issue raised by petitioner is whether the closing of its Philadelphia mill "creates any problem of price inflation" (Pet. 10). Petitioner suggests that the regulations as applied contravene the provision of Section 2 (a) of the Act that the Administrator may issue maximum price regulations which "in his judgment * * * will effectuate the purposes of the Act." Examination of the admitted facts demonstrates, however, that the General Maximum Price Regulation and Maximum Price Regulation No. 188 prevent unwarranted increases in the price level of gypsum products sold in the Philadelphia area.

Petitioner and its competitors have sold their gypsum products at the same total cost to purchasers in the Philadelphia area without regard to whether the commodity was manufactured there. In addition, petitioner is now in precisely the same position as its competitors with respect to freight absorption in sales in this area. The Administrator found that it would consequently be both impracticable and unfair to increase petitioner's maximum prices without permitting corresponding increases in the maximum prices of

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petitioner's competitors (R. 68–69). It is apparent that such general increases in the maximum prices of all manufacturers would be wholly unwarranted in view of the fact that the situation of only one manufacturer has changed and in the absence of evidence that current maximum prices result in hardship. Moreover, petitioner now recognizes, as the Administrator found, that increases in the level of manufacturers' prices might well require upward adjustment of the maximum prices of "hundreds of retail lumber dealers" in the Philadelphia area who sell gypsum products at retail (R. 69; Pet. 12–13). To permit such unnecessary increases in the prices of all sellers at both manufacturing and retail levels would clearly be inconsistent with the purposes specified in Section 1 (a) of the Act "to stabilize prices" and "to prevent * * * unwarranted * * * increases in prices."

Petitioner suggests that Section 2 (a) requires the Administrator to adjust prices for increases in transportation costs. But Section 2 (a) requires the Administrator to make adjustments only "for such relevant factors as he may determine and deem to be of general applicability," whereas here transportation costs have increased only on petitioner's sales. Furthermore, Section 2 (a) directs that increases in costs of a particular kind must be considered in connection with increases or decreases in all other costs of production or distribution, as well as general increases

or decreases in profits. Petitioner presented no evidence to the Administrator bearing upon the necessity for adjustment of maximum prices for gypsum products in the light of all these factors.

2. Petitioner contends that the maximum price regulations are invalid in their application to gypsum products sold in the Philadelphia area on the ground that on the closing of the Philadelphia mill these regulations required petitioner to reduce its prices. Petitioner refers to no provision of the Act which provides that regulations which require a price reduction are invalid; on the contrary, Section 2 (c) of the Act expressly provides that any maximum price regulation or order "may provide for a maximum price * * * below the price or prices prevailing for the commodity or commodities * * * at the time of the issuance of such regulation or order." It is, however, contended that these regulations violate the provision of Section 2 (a) of the Act which requires that "so far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 * * *."

Both the contention that the regulations have required reductions in petitioner's prices and the contention that the Administrator did not give due consideration to the prevailing prices of October 1 to 15, 1941, have no basis in fact. The record clearly shows that the level of prices in the

Philadelphia area during both October 1941 and March 1942 was established in terms of Philadelphia prices plus freight from Philadelphia, and was maintained both by petitioner and by its competitors regardless of whether the commodity was shipped from Philadelphia or from outside the Philadelphia area. This price structure based upon Philadelphia determined resale prices of lumber dealers and costs to ultimate consumers. The maximum price regulations involved, in preventing general increases in this price structure above the levels of October 1 to October 15, 1941, can hardly be said to be inconsistent with the requirement of Section 2 (a) of the Act that the Administrator shall give due consideration to prices prevailing during that period.

3. Petitioner attempts to place in issue the validity of the issuance of "freeze" regulations, such as the General Maximum Price Regulation and Maximum Price Regulation No. 188, which established maximum prices in terms of the highest prices charged by individual sellers during a specified based period. However, such an attack upon the initial validity of these regulations may not properly be raised in this proceeding, since petitioner's protest was not filed within the sixty-day period following their issuance, as required by Section 203 (a) of the Act. Nor does petitioner refer to any provision of the Act which would preclude the establishment of maximum prices by reference to prices charged

during a base period; on the contrary, Section 2 (c) of the Act provides that maximum price regulations "may be established in such form and manner * * * as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act."[4]

Petitioner contends in the alternative that if these regulations are valid "then it is also true that the standards to be observed by the Administrator in fixing such prices must be applied to each individual seller rather than the industry as a whole" (Pet. 18). Petitioner contrasts "freeze" regulations, under which maximum prices of individual sellers may differ, with specific dollar-and-cents maximum prices prescribed for all sellers, and apparently concedes that industry-wide standards appropriately govern the latter type of regulation. However, this contrast is not presented by the present record, since it clearly appears that manufacturers of gypsum products, at least in the Philadelphia area, have met competitors' prices with resulting price uniformity (R. 29–30). Consequently, with respect to this industry, there is no practical difference between specified dollar-and-cents maximum prices and maximum prices estab-

[4] The Senate Report on the price control bill (Sen. Rep. 931, 77th Cong., 2d Sess., 1942, p. 17) in discussing Section 2 (c) of the bill, states: "Maximum prices or rents for all commodities may of course be established in terms of prices prevailing generally or in individual establishments on a particular date, and permissible variations therefrom."

lished in terms of the highest prices charged by individual sellers.

In any event, there can be no justification for the attempt to modify the basic standard of Section 2 (a) of the Act that maximum price regulations shall be "generally fair and equitable." The legislative history of this provision shows that the validity of maximum price regulations must be determined in the light of over-all operations of producers of the major part of the output of any commodity.[5] While petitioner contends that the Administrator has not produced facts showing that maximum prices for gypsum products comply with this standard (Pet. 19). Section 204 (b) of the Act provides that no maximum price regulation shall be enjoined or set aside "unless the complainant establishes" that the regulation is invalid. In the protest proceedings the Administrator expressly afforded petitioner an opportunity to show whether it or other members of the industry were subjected to hardship by reason of these maximum prices (R. 48).

[5] The Senate Report on the price control bill (Sen. Rep. No. 931, 77th Cong., 2d Sess., 1942, p. 15) states: "Because of the legislative nature of regulations establishing maximum prices, applying to large numbers of sellers, the bill does not guarantee a profit to each individual seller. It requires instead that such prices be generally fair and equitable as applied to the sellers responsible for the major part of the output of any commodity. As to such sellers it is the effect of the maximum price upon their over-all operations as business units that must be considered."

Petitioner produced no such evidence of hardship. Furthermore, petitioner alone has instituted protest proceedings challenging the validity of the applicable maximum prices. Consequently, for the purpose of this case it must be assumed that the regulatory provisions are consistent with the basic requirement that maximum price regulations shall be "generally fair and equitable."

4. Petitioner further contends that the applicable regulations contravene the provision of Section 2 (a) of the Act that regulations shall be of "general applicability and effect." This contention is based upon the assertion that in other situations other sellers are permitted to charge full f. o. b. prices and may require the purchaser to bear all of the freight expense. But it has not been shown that in situations parallel to the present case the applicable regulations are interpreted differently. On the contrary, the interpretation applying these regulations in the manner to which petitioner objects has been published in general terms and has governed all like cases.[6]

[6] The following general interpretation of the General Maximum Price Regulation, transmitted to all field offices and released to the public in Press Release OPA–1146 (November 23, 1942), p. 16 (O. P. A. Service p. 11: 980), provided: "A seller operating two plants during March sold f. o. b. nearest plant to customer, regardless of the actual source of the goods shipped. The seller closed one of his plants and desires to discontinue the practice of absorbing excess freight charges. Those customers who are nearest the discontinued plant may still only be charged the maximum f. o. b. price the closed plant, since shipment f. o. b. the more distant

The interpretations to which petitioner points as inconsistent with the application of the regulations in this case did not involve a basing-point price structure which had been established for an area and which determined selling prices in that area without regard to the point of shipment.

The requirement of Section 2 (a) of the Act that maximum price regulations shall be of "general applicability and effect" does not, of course, preclude the Price Administrator from issuing regulations which deal differently with distinct situations. Section 2 (c) of the Act provides that maximum price regulations "may contain such classifications and differentiations * * * as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act." Nor, as the opinion below demonstrates, is there any basis for asserting that these maximum price regulations discriminate against petitioner in favor of its competitors. Petitioner's competitors in the Philadelphia area are subject to the maximum prices to which petitioner objects, and must absorb freight costs in amounts commensurate with the freight absorption required of petitioner. Rather than being subjected

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operating plant means that such customers would be required to pay a larger proportion of the transportation charges than they did during March. Consequently the seller must continue to absorb the excess transportation charges for shipments to those customers who are nearest the closed plant (10-6-42)."

to a discriminatory disadvantage, petitioner is now in the same position as all its competitors which sell gypsum products in the Philadelphia area.

5. Petitioner finally contends that the General Maximum Price Regulation and Maximum Price Regulation No. 188 violate Section 2 (h) of the Act, which provides:

> The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

Petitioner does not assert that a practice of receiving full f. o. b. mill prices had been "established in the industry"; the numerous examples to the contrary voluntarily adopted both by petitioner and by its competitors in sales in the Philadelphia area have been pointed out in the statement of facts and by the court below (R. 124). Instead, petitioner seeks protection under Section 2 (h) for the practice of the gypsum industry not "to reduce f. o. b. plant prices except in cases of economic necessity" (Pet. 22). The assumption that Congress intended to protect such a practice is not supported by the language of Section 2 (h) of the Act, and indeed would be inconsistent with the basic purpose of the program of price control,

which became necessary only because during a period of wartime scarcity "economic necessity" would no longer restrain price increases.

The legislative history of the Act shows that Congress did not intend by Section 2 (h) to vitiate the powers granted by Section 2 (a) of the Act. Section 2 (h) was added to the Senate bill by an amendment sponsored by Senator Vandenberg, who stated:[7]

> The sole purpose of the amendment, Mr. President, is to make sure that the bill is simply a price-control bill, and not a business management-control bill.

Senator Vandenberg further described the provisions of Section 2 (h) as:[8]

> Simply an effort to make sure that the authority granted in the bill does not permit the price controller to reach down into the business practice of an institution and undertake to revamp it.

It is quite clear that the General Maximum Price Regulation and Maximum Price Regulation No. 188 have no other purpose or effect than to prevent price increases and that, as the court below found, "the Administrator did not undertake to invade or revamp the business practices or methods of the gypsum industry" (R. 129). These regulations, in holding firm the price level

[7] 88 Cong. Rec., Jan. 8, 1942, at 114.
[8] 88 Cong. Rec., Jan. 8, 1942, at 103.

for gypsum products sold in the Philadelphia area, in no respect contravene Section 2 (h) and are fully within the scope of the authority over maximum prices delegated to the Administrator. Cf. *Philadelphia Coke Co.* v. *Bowles* (Em. Ct. App., decided Dec. 15, 1943).

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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DECEMBER 1943.